

AUG 18 2003

## MEMORANDUM FOR RECORD

SUBJECT: Department of the Army Record of Decision on the Final Environmental Impact Statement on Improving the Regulatory Process in Southwest Florida, Lee and Collier Counties, Florida.

1. Purpose of EIS. This EIS was prepared to improve the U.S. Army Corps of Engineers' reviews of permit applications under Section 404 of the Clean Water Act. A landowner must apply for and receive a Department of the Army Permit (Permit) before placing fill in Waters of the United States, including wetlands. The Corps review process for such applications include: determination whether the Corps has and the extent of jurisdiction over the proposed work; solicitation of comments from the general public, adjacent landowners, and government agencies; dialog with the applicant to clarify and supplement the site-specific information in the application; assessment of the benefits and detriments caused by the proposed work to fish and wildlife values, wetlands, and other public interest factors; determination of compliance with other legal requirements such as the Endangered Species Act and the Clean Water Act Section 404(b)(1) Guidelines; and, if the decision is to issue a Permit, monitoring the compliance with the terms and conditions associated with the authorization. The purpose of the EIS is to introduce better information into this process, not to change the process itself.

a. The EIS document had other purposes. It disclosed the potential cumulative effects on a wide variety of issues as a result of five alternative predictions of future conditions. Each future depicts what the landscape may or may not look like in 20+/- years as a result of many individual decisions by the Corps, landowners, Counties and others. Some but not all of the changes in the landscape will involve a Department of the Army Permit. However, by depicting all changes, the EIS provides to the Corps staff the context of wetland permitting within the whole set of actions that change the landscape.

b. The EIS document also compares the cumulative environmental and other effects resulting from each future for a wide variety of issues. This enables the Corps staff to better understand the context of the individual project impacts within the whole cumulative impact. With these two perspectives now

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available, Corps staff can better appreciate the potential effects of each individual permit application. An ancillary benefit is that landowners have this same information and can include in their applications how their proposals addressed the applicable issues. This should result both in better projects and more predictable reviews. In addition, since EIS document clarifies terminology and provides the essential background knowledge on an issue, members of the public can provide more site-specific and comprehensive comment letters. However, as is the case with most reports issued at the end of a complicated study, the EIS document is long and contains much detail and many cross-references.

c. The EIS document also described the Corps' proposal that its staff would use a document, called the "Permit Review Criteria" in their day-to-day review of incoming applications. The draft of that document was attached as Appendix H to EIS. The appendix provided a set of maps and associated narratives for a subset of issues covered by the EIS. The maps described the locations where wetland fill will possibly affect an issue for which the Corps has concerns arising from the potential individual and cumulative effects.

d. The purpose of this memorandum is to describe the revision and implementation of that proposal.

2. Background. The Corps initiated the EIS out of concern whether the incremental (permit-by-permit) reviews were adequately addressing cumulative direct and secondary effects of the wetland fill in the rapidly growing Southwest Florida area.

a. The Corps concern focused particularly on the Estero Bay watershed when several large applications and pre-application discussions were on going along Daniels Road, Alico Road, and Corkscrew Roads. Each of the applications had the similar recurring issues of loss of spatial habitat (particularly for endangered species), changes in water quality and flows/timing on downstream water bodies, and appropriate amount and location of wetland mitigation. The issues especially came to the public eye with the submission of the

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application for the campus of a new university, the tenth in the State system (now named Florida Gulf Coast University.) The proposed campus location was viewed by several commentators as "jumping" the edge of suburban development into the remaining rural area. One concern was that the university would act as a magnet for development of this rural area that would not otherwise occur. A second concern was that the permitting would set a precedent for future development. However, since it was recognized that these concerns were not arising from the campus itself, but from the projection of future development, the concept of building a local group to look at these issues was discussed informally during the timeframe of the application review and ultimately two groups were created through a negotiated settlement of an administrative challenge to the State permit and as a consideration to address Federal concerns relative to the Corps permit. The first group is the Estero Bay Agency on Bay Management as an entity of the Southwest Florida Regional Planning Council that to the present day brings key persons together to discuss issues relative to the watershed. (Two documents produced by this group are included in Appendix F of the EIS.) The second group, the Arnold Committee, chaired by Representative J. Keith Arnold, Florida House of Representatives, consisted of a private citizens and landowners along with representatives of non-profit groups and Federal, State, and local governments. The committee produced a report that provided an assessment of overall land uses and natural systems, environmental protection and mitigation tools. Since the report was not accepted by the entire membership, the Corps remained concerned that it needed another document to better understand the potential future cumulative environmental effects.

b. To clarify its needs, the Corps drafted a "white paper" to compare various procedural vehicles to obtain this information. The paper considered five options: continue Permit by Permit Review; perform a Carrying Capacity Study; perform an EIS on the next application for a large project; perform a non-application-specific EIS; and, participate in a sub-committee or similar cooperative effort with a group such as the then-existing Southwest Florida Issues Group of the

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Governor's Commission for a Sustainable South Florida. The Corps approached, formally and informally, a wide variety of existing inter-governmental groups and expressed willingness to work with others. The Corps also considered using the results of the Comprehensive Wetlands Conservation, Permitting, and Mitigation Strategy then being prepared for the Working Group of the South Florida Ecosystem Restoration Task Force. The Strategy's tasks included assembling natural resource mapping information, developing a computer-based tool to report that information rapidly for any selected location, developing assessments for various wetland functions, identifying areas of potential development, and identifying opportunities for restoration. This was a joint Federal-State effort and some of the work products that were available at the time were used in preparation of the EIS. The EIS process was selected to avoid inventing a new study process. The EIS process provides for full disclosure of available information, identifies and compares alternatives, requires public involvement, and utilizes existing administrative processes in each federal agency for coordination.

c. Subsequently, the Corps worked with Lee County and Collier County to develop a Memorandum of Understanding to guide the partnering of the three in the effort. The MOU laid out the procedure and the expected products. The drafts were mailed to interested parties of the public for their information. Ultimately, the MOU was not adopted at a unique joint session of the two County Commissions.

d. After soliciting and reviewing public comments on the proposed scope of the EIS, the Corps determined that the study could not confine itself to the Estero Bay watershed because natural areas and species ranges cross multiple watersheds. To discuss one location of concern would also require looking at the relationships to the surrounding location. The watershed of concern was characterized as the hub and the surrounding areas as the spokes. The study area established measured 1,556 square miles, the northwest corner roughly defined by the cities of Ft Myers/Sanibel, the northeast by Lehigh Acres/Immokalee, the southwest by Naples and the southeast by Everglades City.

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e. The Corps created and hosted an Alternative Development Group (ADG) composed of citizens, landowners, non-governmental organizations, agencies, and other stakeholders affected in some way by the Corps Regulatory Program in order to represent the wide range of views of the community and to provide a mix of expertise. Through professionally facilitated meetings, the ADG defined 12 issues that they felt should be evaluated, gathered and shared existing knowledge to understand the concerns relative to the issues, agreed to 62 factors to be used as measurements to support evaluation of the issues, and then created and compared 28 alternative future landscapes. The futures depict what the landscape may or may not look like in 20+/- years based on expected actions (such as those identified by the County Comprehensive Plans) or actions that various members of the group suggested could or should occur. The group's role was limited to visualization of these alternative futures, the Corps did not ask the ADG to create any group advice or recommendations concerning them.

f. The Corps analyzed the alternative future maps created by the ADG to develop an "Overlay of Alternatives" map. This analysis indicated the group had a good degree of common vision where development and where natural resource areas would be in the future but with a greater degree of differences as to site design and other constraints. In 8% of the area there was multiple predictions and in 25% of the area the difference in predictions was generally on the boundary between development and preserve areas. The ADG's report was included as an appendix in the EIS. The Corps used the ADG work to assemble the five potential alternative futures in the EIS. The Corps then prepared comparative evaluations of each of the futures for the issues identified by the ADG. The Corps also developed, along with the U.S. Environmental Protection Agency and U.S. Fish and Wildlife, descriptions of the existing natural resource conditions, analysis of historic vegetation, report of permitting information, description of socio-economic considerations, evaluation of endangered species effects, and assessments of water quality.

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g. The EIS as a document provides several things including the following. First, it places information in one document so that the public and reviewers are better informed of the terminology and interrelationships of the issues relevant to future reviews of permit applications. Second, it discloses estimates of the future total effects so the reviewer can give appropriate weight to the individual project's effect. While the five futures do not represent all the possible combinations of projects (including the subset of those with Corps permit decisions), they do represent a range of possible collective total benefits and detriments. Third, it lists concerns that landowners can anticipate may arise during application reviews. Fourth, it shows those geographic areas with fewer concerns and therefore provides information to guide future development of General Permits or other mechanisms to expedite the Corps' administrative processes. This, on the other hand, also shows those areas of greater concern. Other products flowing from the preparation of the EIS include, but are not limited to: facilitating 22 days of open discussion amongst widely disparate special interests on environmental issues in the region; providing support to increase staff levels at the local office; conducting public meetings on the role of the Corps program and what we are attempting to do; contributed to the development of procedures for consultations for various endangered species; and contributed to the heightened awareness of water quality issues.

### 3. Alternatives.

a. No action Alternative (permit by permit review.) The Corps presently makes its determinations of the benefit and detriments of proposed fills on a case-by-case basis. The factors to be considered, and the weight to be afforded each factor, are presently left to the professional judgment of the Corps project manager with oversight from Regulatory Division management. The "no action" alternative would be to continue evaluating permit applications in the same manner as before the EIS. Under this alternative, the project manager would identify issues relevant to an application based on one or a combination of: comments in reply to a public notice on the application, a

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site visit, results of reviews of neighboring sites, and personal knowledge of the region's ecosystems.

b. Originally Proposed Alternative. Appendix H of the Final EIS provides a draft "Permit Review Criteria" that included several maps. The following is quoted from Section 2.2.2 of the EIS. "This document will be used by Corps Project Managers to base the level of effort in reviewing a applications for Department of the Army Permit under Section 404 of the Clean Water Act on the potential cumulative direct and indirect effects. ... The Corps will use this document to focus effort on those factors relevant to the review of the individual projects. In geographic areas where there are few concerns the Corps may at some time in the future be able to reduce the processing time through administrative mechanisms such as General Permits. The document lists many issues. Each issue has its own map. For example, a particular species has a map showing areas with a high probability that species habitat is present and a high potential that the loss of that habitat will adversely affect the species. The number of issues applicable to a particular project will depend on how many of the individual maps intersect the project location in addition to other information. A location with a larger number of issues will receive a greater rigor of review. However, the maps do not predetermine the Corps permit decision. The maps are necessarily based on regional or statewide mapping programs. The applicant can submit and the Corps will use site-specific information to confirm the map (for example, whether habitat is actually present) or find the issue is not applicable due to the nature of the project." The benefits of the original proposal are described at Section 4.0 of the Final EIS as follows. "The use of the Permit Review Criteria and the Natural Resource Overlay Map will decrease the probability of potential effect being inadvertently overlooked on a project. The use of the assessments described in the permit review criteria will more quickly identify the degree of that effect and thereby the level of concern. The convenient reference to pertinent information compiled in this EIS will increase the knowledge and expertise of the project reviewer and applicant to address the adverse effect"

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c. Develop general permits. The Corps was hoping to streamline permitting through General Permits but many commentors, both landowners and resource proponents, identified a variety of site-specific information that should be included, particularly for wildlife concerns. We will continue to work with U.S. Fish and Wildlife Service on developing more detailed assessment tools for the various listed species in this region since we believe that will remove some of the difficulties with implementing a General Permit.

d. Coordination with State or local regulatory programs. Conceptually, this provides that the Corps would utilize the decisions of these other programs except for those things for which the Federal government only has jurisdiction. In practice, the programs don't overlap evenly. For example, the State and Federal definitions of wetlands are not the same. The Corps and FDEP have has a long history of working to blend the programs and they do in several places. For example, the Corps accepts the use of the State Permit Application form in lieu of the Federal one. The Corps had hoped that this EIS effort would have resulted in some or many of the issues to be defined to such a degree that the State or local program could incorporate them into their evaluations so that the Corps would not have to perform a duplicate review. The preparation of maps and criteria with sufficient detail to do this has proven more difficult than anticipated for a variety of technical and legal reasons. We will continue to strive to improve the clarity and acceptance of assessment methods with all our Federal, State, and local partners.

4. Decision. Corps project managers will utilize enclosure (1) during their reviews of applications. The enclosure describes four tasks that will be performed. Attachments to the enclosure provide additional wildlife and water quality information. These tasks are: (1) screen the incoming applications project locations against a set of maps to identify potential issues; (2) use site specific information provided as part of the application process to determine whether the issue is relevant to the project at hand; (3) if relevant, use the information accompanying the maps as well as information provided by the



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applicant or others to assess the effect, if any; and, (4) compare the project location to the predicted futures presented by the EIS. The tasks are designed to use the information in the EIS as a supplement to the normal permit-by-permit review process. The purposes of these supplemental tasks are to increase assurance that important natural resource issues are identified early in the review process and to provide information on the possible project effects on an issue in the context of potential future cumulative effects. The maps do not represent permittable/non-permittable areas.

a. The decision reflects a modification of the originally proposed Appendix H. This is based on public and agency comments, enclosure (2), and on experiences with the review of applications since the release of the EIS document. For information purposes, the changes from Appendix H are described in enclosure (3).

b. Since the decision to adopt enclosure (1) is strictly procedural, there are no direct environmental effects. However, the Corps considers the decision to be the most practicable means to avoid or minimize environmental harm that may otherwise result from permitting actions, consistent with existing laws and regulations. Measures to avoid or minimize harm are part of each individual decision on permit applications. This decision does not remove any of these protections from the current process, will increase the assurance that some issue is not missed in a review, and is designed to increase the understanding of the possible ecological effects of the wetland fill proposal under review.

c. The Corps anticipates periodically comparing actual permit data to the EIS predicted futures and to the screening maps. Enclosure (4) provides such an analysis.

5. Conclusion. Many of Regulated public and environmental interests who have commented on the EIS in general fear that the maps will represent either permittable areas or non-permittable areas. However, the Corps is only using these to strengthen the analysis of the cumulative effects in the region and increase

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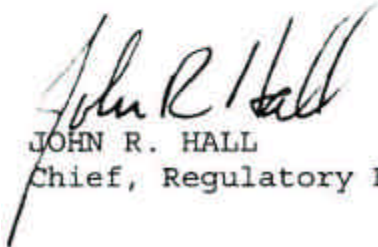
the assurance that some issue is identified early in the process. This effort has resulted in a compilation of information that improves the understanding of some of the important issues in the watersheds within the study area.

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1. Permit Review Criteria
2. Comments and Responses
3. Changes from Appendix H
4. Monitoring Report